United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig with affidavit of mlg

76-1560

To be argued by
MARILYN GAINEY

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1560

UNITED STATES OF AMERICA,
Appellee,

—against—

GERALD JOSEPH GERARDI,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Gerald Joseph Gerardi appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*) entered on October 15, 1976, convicting him, following his plea of guilty, of conspiracy to commit armed bank robberies, in violation of Title 18, United States Code, Section 371. Appellant was sentenced to a four year term of imprisonment, to be served concurrently with an eight year sentence for an unrelated conviction previously imposed by the United States District Court for the District of Massachusetts. Appellant is presently incarcerated.

On appeal appellant contends that the district court erred in denying his motion to withdraw his guilty plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure.

Statement of Facts

From September 9, 1975 through November 4, 1975, as part of an ongoing bank robbery investigation, special agents of the Federal Bureau of Investigation and detectives from the New York City Police Department maintained a surveillance of appellant Gerardi and two co-defendants, Kenneth Marshall Schreter and Anthony M. Juliano. During this period, Gerardi, Schreter and Juliano were observed "casing" approximately a dozen different banks in Brooklyn, Queens and Nassau Counties and making preparations for robbing these banks. Subsequently, Schreter and Juliano attempted to rob two of the banks which had been "cased" by appellant Gerardi. Gerardi was also observed exiting Schreter's residence in possession of certain distinctive bags, believed to contain weapons and disguise type clothing to be used in the commission of bank robberies, and carrying these distinctive bags into certain premises located at 172nd Street, Queens, New York. (A. 16-17).[1]

On November 3, 1975, the United States Magistrate issued arrest warrants for Gerardi, Schreter and Juliano and search warrants for premises located in Brooklyn and Queens. The following day, Schreter was arrested at premises located at 172nd Street, Queens, New York. A search of these premises, pursuant to a search warrant, uncovered numerous weapons, ski masks, plastic masks, master car keys, clothing to be used for disguise and false identification papers. (Appellants app. A-17). On the same day, appellant Gerardi was arrested in Boston where he was awaiting trial in the United States District Court of the District of Massachusetts. (Co-

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[1] Numerals preceded by the letter "A" refer to pages in the Appellant's Appendix.

defendant Schreter, following his arrest, was removed to Boston to stand trial with Gerardi).[2]

On November 11, 1975, a one count indictment (75 CR 850) was filed in the Eastern District of New York charging Gerardi, Schreter and Juliano with conspiracy to commit armed bank robberies, in violation of 18 U.S.C. § 371, to which Gerardi pleaded not guilty on January 13, 1976. Thereafter, on April 6, 1976, appellant appeared before the district court, withdrew his original plea, and pleaded guilty to the indictment. Following pleas of guilty by his co-defendants, Schreter and Juliano,[3] the court turned its attention to Gerardi. Following the advice of rights, the indictment in its entirety, was read in open court.[4] Having read the indictment, the following colloquy transpired between Gerardi and Judge Bramwell:

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[2] Gerardi and Schreter were subsequently convicted in Massachusetts for conspiracy and concealing stone securities transported in interstate commerce in violation of 18 U.S.C. § 371 and 2315. On January 26, 1976, Gerardi received the eight year sentence referred to above. Co-defendant Juliano was not apprehended until March, 1976.

[3] On April 6, 1976, Schreter and Juliano also pleaded guilty before Judge Bramwell. Schreter pleaded to armed bank robbery, 18 U.S.C. § 2113(d) and Juliano pleaded guilty to bank robbery, 18 U.S.C. § 2113(a). On June 11, 1976 Juliano was sentenced to a twenty year term of imprisonment. On July 23, 1976 Schreter was sentenced to a twenty-four year term of imprisonment.

[4] This portion of the plea colloquy is as follows: (A. 68-70)

> The Court: The indictment reads as follows:
>
> On or about and between the 9th day of September 1975 and the 4th day of November 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant Marshall Schreter, Gerald Gerardi and Anthony M. Juliano did knowingly and wilfully conspire to commit an offense against the United States in violation of Title 18, United States Code, Section 2113(a) and 2113(d) by conspiring to take from the person and presence of employees of several

[Footnote continued on following page]

diverse banks by force, violence, intimidation and the use of dangerous weapons, a quantity of United States currency, which currency was in the care and custody of said banks, the deposits of said banks being then and there incurred by the Federal Deposit Insurance Corporation in violation of law.

In furtherance of said unlawful conspiracy and for the purpose of obtaining the objectives thereof, the defendants Marshall K. Schreter, Gerald Gerardi and Anthony M. Juliano, committed amongst others the following overt acts.

One. On or about the ninth day of September 1975, the defendant Marshall Kenneth Schreter, defendant Gerald Joseph Gerardi drove a vehicle to the vicinity of the European American Bank and Trust Company, 330 Sunrise Highway, Rockville Centre, New York, whereupon both defendants entered the said bank.

Two. On or about the 12th day of September 1975, the defendant Marshall Kenneth Schreter and defendant Anthony M. Juliano drove a vehicle to the vicinity of the Manufacturers Trust Company Bank, 2832 Rockaway Parkway, Brooklyn, New York, at which bank the defendant Anthony M. Juliano made notes.

Three. On or about the seventh day of September 1975, the defendant Marshall Kenneth Schreter and defendant Gerald Joseph Gerardi drove a vehicle from Queens, New York to the residence of the defendant Anthony M. Juliano in Highland, New Jersey.

Four. On or about the tenth day of October 1975, the defendant Marshall Kenneth Schreter and the defendant Anthony M. Juliano, drove a vehicle to the vicinity of the Chase Manhattan Bank, 187-08 Horace Harding Boulevard, Queens, New York.

Five. On or about the 24th day of October 1975, the defendant Marshall K. Schreter, Gerald Gerardi met in Queens, New York and both defendants drove in a vehicle to the Ridgewood Savings Bank in Queens, New York, at which location Schreter entered the said bank.

Six. On or about the fourth day of November 1975, Queens, New York and elsewhere, the defendant Marshall K. Schreter did possess a quantity of firearms, masks and gloves.

"[The Court]: That is the indictment. You will now have to tell the Court in your own words what you did that brings this charge before the Court.

Defendant Gerardi: What did I do? I was present in the company of Marshall K. Schreter.

The Court: Anybody else?

Defendant Gerardi: No.

The Court: And what did you and Schreter do?

Defendant Schreter: Allegedly we——

The Court: Not allegedly. I want to know what you did.

Defendant Gerardi: We drove in the vicinity of these banks, two banks.

The Court: When was this that you drove into the vicinity of these banks?

Defendant Gerardi: I think one was on the sixth—ninth day of September and the other time was on the 24th of October.

The Court: And what purpose were you driving to these banks?

Defendant Gerardi: To be honest, the purpose I drove to these banks—well, I understand that I drove to the bank with Marshall and he went into the bank. The purpose I drove to the bank myself, the purpose I was with him, his intention I assume was to steal these——

The Court: Were you involved in this in any way?

Defendant Gerardi: Into stealing from the banks?

The Court: Into stealing from these banks.

Defendant Gerardi: No, sir.

The Court: You weren't involved in any way?

Mr. Dawson [Assistant U.S. Attorney]: If I may state none of the banks in the indictment were robbed. There was no actual taking of any money from these banks.

The Court: Was there a conspiracy between yourself and Mr. Schreter to do something?

Defendant Gerardi: The way I understand the conspiracy right now, I have to say——

The Court: A conspiracy is an agreement. Was there a criminal agreement between yourself and Mr. Schreter?

Defendant Gerardi: Well, I guess I'll have to say, yes.

The Court: You don't have to say anything.

Defendant Gerardi: Yes, sir.

The Court: Are you doing that because you think I want to hear it?

I want you to tell me, was there a conspiracy between yourself and Mr. Schreter?

Defendant Gerardi: Yes.

The Court: And what was the purpose of this conspiracy?

Defendant Gerardi: To ride in the vicinity of these here banks and look at these banks.

The Court: For what purpose, to make a deposit or look at the banks?

Defendant Gerardi: I guess to look at the banks.

The Court: To look at the banks. What was the purpose in looking at the banks? What was your purpose in driving in the vicinity and looking at the banks?

Defendant Gerardi: I believe riding in the vicinity for a later date to be robbed, I guess.

The Court: And was there an arrangement, an agreement between yourself and Mr. Schreter that this was part of this purpose that you just spoke of?

Defendant Gerardi: Yes.

The Court: Do you understand that a conspiracy involves two or more people; do you understand that?

Defendant Gerardi: Yes, I understand that.

The Court: And do you understand there must be an agreement between these people? Do you understand that?

Defendant Gerardi: Agreement how, sir??

The Court: There must be an arrangement, an understanding, that's the basis of the agreement, an arrangement and understanding.

Defendant Gerardi: It doesn't have to be verbal, just an understanding?

The Court: You could act in such a way that this is an understanding of what you are doing.

Defendant Gerardi: Yes, sir.

The Court: It doesn't have to be specifically verbal or written.

Defendant Gerardi: Yes, sir.

The Court: Do you understand that this is the basis of a conspiracy?

Defendant Gerardi: Yes, sir.

The Court: Now, in connection with what you did, what were the dates between which you did these things or around when did you do these things?

Defendant Gerardi: Between September 6th, it ended when I was arrested November 4th.

The Court: Of what year?

Defendant Gerardi: Of '75.

The Court: And where did these things take place?

Defendant Gerardi: In New York City somewheres, I'm not too familiar with New York City, but in New York City somewhere.

The Court: Was it out in Long Island?

Defendant Gerardi: Yes, out on the Island.

The Court: Did you understand that the going to these banks with yourself and Schreter was part of your conspiracy; did you understand that?

Defendant Gerardi: Now, I understand it's part of my conspiracy; yes.

The Court: Did you understand it then?

Defendant Gerardi: At that time I never thought that anything like this would. Now I know that this was part of a conspiracy.

The Court: Of what you did in furtherance of the conspiracy with Mr. Schreter?

Defendant Gerardi: Yes, it has to be now, yes.

The Court: Mr. Dawson, anything further?

Mr. Dawson: I think the Court has covered it. I was going to say that the defendant by his actions and the actions of Mr. Schreter at the time back in '75 clearly had an understanding of the minds rather than any written agreement.

The Court: I'm sure there was no written agreement. That's very rare, if it ever happens.

Mr. Dawson: That's correct.

The Court: All right, Mr. Gerardi, did you actually do what you were charged with in this indictment?

Defendant Gerardi: Yes, sir.

The Court: Did you do it knowingly and wilfully?

Defendant Gerardi: Yes, sir. (A. 70-75)

At the completion of this inquiry, the promises made by the Government were set forth on the record.[5] Thereafter, Gerardi's plea was accepted.

On September 15, 1976, following several sentencing adjournments, at defense request, appellant, now represented by retained counsel, Frank A. Lopez, Esq., moved to withdraw his guilty plea.[6] According to the motion

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[5] The Government stated that, in exchange for the guilty plea, Gerardi, similarly with Juliano and Schreter, would not be further prosecuted concerning 35 alleged other bank robberies committed by the group. Moreover, the Government promised to recommend that whatever sentence be imposed, that it be concurrent with the 8 year term of imprisonment imposed by the District Court in Massachusetts (A. 76-77).

[6] The Docket Sheet (A. 1-3) indicates that Theodore Jones, Esq., who was assigned by Judge Bramwell pursuant to the Criminal Justice Act, was relieved as counsel on September 27, 1976. Interestingly, however, at the October 15, 1976 hearing, Gerardi was still represented by Theodore Jones, Esq., of counsel to Frank A. Lopez, Esq. (A. 96).

papers (A6-A12), Gerardi claimed that he had pleaded guilty in the mistaken belief that the guilty pleas of his two co-defendants had limited his chances as to proceeding to trial; that the record established only a "equivocal" factual basis; that Gerardi had been assured that his co-defendant would exculpate him (and would provide him affidavits to this effect);[7] that the Government would not be prejudiced by the withdrawal of the guilty plea and, finally, because he was "innocent of the charge." On October 15, 1976, following receipt of a lengthy affidavit in opposition by the Government (A13-22), a hearing was held on the motion to withdraw the plea of guilty. During that hearing the court conducted an inquiry into, *inter alia*, the voluntariness of the plea, the delay in petitioning the court for withdrawal and appellant's reason for pleading guilty (A. 95-125). Although there were no specific findings, the motion was denied and Gerardi was sentenced, as set forth above, to a four year prison term, pursuant to 18 U.S.C. § 4205(b)(2), to be concurrent with the Massachusetts sentence.

ARGUMENT

The District Court Did Not Abuse Its Discretion In Refusing To Permit Appellant To Withdraw His Guilty Plea.

In support of his contention that the district court erred in not letting him withdraw his guilty plea, appellant claims that: (1) he is innocent of the charge to which he pleaded guilty; (2) the plea was involuntarily given; (3) that the Government will not be prejudiced if he is allowed to withdraw his plea; and (4) that the motion to withdraw was timely made.

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[7] To date, there have been no such affidavits filed by co-defendants Schreter and Juliano, either with this Court or with the district court.

To begin with, the granting or denial of a motion to withdraw a previously entered plea is, as conceded by appellant, within the discretion of the trial court. Here, we believe that appellant's plea was a knowing, voluntary and intelligent act, which was made with awareness of the relevant circumstances and appreciation of the likely consequences. Accordingly, we submit that, for the reasons set forth below, the district court quite properly exercised its discretion in not permitting appellant to withdraw his plea of guilty.

(1) Introduction

Rule 32(d), Fed. R. Crim. P., permits the post-sentence withdrawal of a guilty plea only to prevent "manifest" injustice.[8] But there is no corresponding statutorily defined standard for like motions which may, of course, be brought on prior to the imposition of sentence. *United States* v. *Barker*, 514 F.2d 208, 218 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975). Federal Courts, however, following the lead of *Kercheval* v. *United States*, 274 U.S. 220 (1927), have uniformly held before a defendant will prevail on a presentence motion to withdraw, a motion all courts recognize is a matter of discretion not of right, it is the defendant's burden to show that the granting of the motion would be fair and just. See, e.g. *United States* v. *Giuliano*, 348 F.2d 217 (2d Cir.), *cert. denied*, 282 U.S. 946 (1965); *United States* v. *Marshall*, 510 F.2d 792 (D.C. Cir. 1975); *United States* v. *DeCavalcante*,

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[8] Rule 32(d) provides:

Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendre may be made only before sentence is imposed or imposition or sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

449 F.2d 139 (3d Cir. 1971); *United States* v. *Simmons*, 497 F.2d 177 (5th Cir.), *cert. denied*, 404 U.S. 1026 (1972). The determination of whether that burden has been satisfied rests within the sound discretion of the trial judge, whose decision is reversible only if clearly erroneous. *United States* v. *Giuliano*, *supra*, 348 F.2d at 221, citing *United States* v. *Hughes*, 325 F.2d 789 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964); see also *United States* v. *Barker*, *supra*, 514 F.2d at 219; *United States* v. *Webster*, 468 F.2d 769 (9th Cir. 1972), *cert. denied*, 410 U.S. 934 (1973); *United States* v. *Erlenborn*, 483 F.2d 165 (9th Cir. 1973); *Kirschberger* v. *United States*, 392 F.2d 782 (5th Cir. 1968).

We believe that whether "fair and just" grounds have been proffered in support of the motion to withdraw a guilty plea must depend upon the facts and circumstances of each case. *United States* v. *Barker*, *supra*, 514 F.2d at 220. No single factor is dispositive, and in the final analysis, a denial of a motion to withdraw a plea should constitute reversible abuse of discretion only where the plea, on the facts before the trial judge, cannot survive collateral attack. *United States* v. *Pisacano*, 459 F.2d 259 (2d Cir. 1972), *judgment vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Lombardozzi*, 436 F.2d 878, *cert. denied*, 402 U.S. 908 (1971); *United States* v. *Giuliano*, *supra*, 348 F.2d at 222. Thus, the sole question to be decided upon review of the trial court's denial of appellant's motion is whether the plea which appellant sought to withdraw was entered unconstitutionally or contrary to the requirements of Rule 11. *United States* v. *Pisacano*, *supra*, 459 F.2d at 262; *United States* v. *Barker*, *supra*, 514 F.2d at 221; *United States* v. *De Calvalcante*, *supra*, 449 F.2d at 141. See *McCarthy* v. *United States*, 394 U.S. 459 (1969). We submit that when measured by these standards, the trial court clearly did not abuse its discretion by denying appellant's motion.

(2) The Claim of Innocence

Appellant proffers his claim of innocence as one of the reasons why his motion to withdraw should have been granted. Although a claim of innocence is certainly one of the factors which a court should consider in ruling on a motion to withdraw a guilty plea (*United States* v. *Hughes*, *supra*, 325 F.2d 789), it has been held that an allegation of innocence or an assertion of a legally cognizable defense does not necessarily entitle one to withdraw his plea. *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1973); *United States* v. *Giuliano*, *supra*, 348 F.2d at 222; *United States* v. *Hughes*, *supra*, 348 F.2d at 792; see also *United States* v. *Webster*, *supra*, 468 F.2d at 771. Were the standard otherwise, since there are few if any cases in which a defendant could not devise some theory of innocence, withdrawal would simply become an automatic right, which it is not. *United States* v. *Barker*, *supra*, 514 F.2d at 221.

Moreover, in the instant case appellant's claim of innocence is undercut by his admissions of guilt at the time he pleaded guilty.[9] If a guilty plea can be withdrawn

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[9] Appellant contends he equivocated during the following colloquy with the court:

> "The Court: .... What was your purpose in driving in the vicinity and looking at the banks?"
>
> "Defendant Gerardi: I believe riding in the vicinity for a later date to be robbed, I guess." (A. 72-73).

It is clear that this statement, at the very least, constitutes an admission by the defendant that he was aware that a future robbery of these banks was contemplated and that his surveillance was in connection with the contemplated robberies. This statement, therefore, can hardly be characterized as a protestation of innocence. More importantly, the statement was followed by an unequivocal admission by appellant that he had been a member of the conspiracy as alleged in the indictment.

[Footnote continued on following page]

merely because the defendant now prefers the opportunity to prove his innocence, the plea itself will be reduced to a meaningless formality, and the elaborate protections fashioned to precede its acceptance will be rendered a meaningless ritual. "In fact, however, a guilty plea is no such trifle, but 'a grave and solemn act' which is 'accepted only with care and discernment.'" *United States* v. *Barker*, *supra*, 514 F.2d at 221, quoting *Brady* v. *United States*, 397 U.S. 742 (1970).

(3) The Voluntariness of Appellant's Plea

Appellant argues that his April 6, 1976 plea of guilty was involuntary and that the district court failed to comply with the requirements of Rule 11 at the time the plea was offered and accepted. Specifically, appellant urges that his "equivocal" responses to questions posed by the court did not provide the court with a sufficient factual basis for the court's acceptance of his plea, the theory being that appellant's hesitancy in acknowledging guilt vitiated the voluntary and knowing quality of the plea and its factual basis. This contention is directly undercut by the record.

Throughout the course of the proceedings, Gerardi was represented by competent counsel who conferred at length with his client immediately prior to the entry of the plea. (A 78). Entry of the plea followed a cautious and thorough *voir dire* by the court, during the course of which the indictment, including the enumerated overt acts, was

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"The Court: All right, Mr. Gerardi, did you actually do what you were charged with in this indictment?"
"Defendant Gerardi: Yes, Sir."
"The Court: Did you do it knowingly and wilfully?"
"Defendant Gerardi: Yes, Sir." (A. 75).

read, in its entirety, by the court to the appellant. (A. 68-70). In addition, as the record demonstrates, Gerardi was fully aware of the elements of the crime of conspiracy (A. 73-74). *Cf. Irizarry* v. *United States*, 508 F.2d 960 (2d Cir. 1974).

Appellant categorizes his *entire* admission of guilty as an equivocation. Examination of the entire record, however, establishes that what appellant now chooses to call equivocation is no more than the evident caution of a person who was being careful not to admit doing any more than that with which he was charged:

> "The Court: Were you involved in this in any way?"
>
> "Defendant Gerardi: Into stealing from these banks?"
>
> "The Court: Into stealing from the banks."
>
> "Defendant Gerardi: No sir."
>
> "Mr. Dawson: If I may state none of the banks in the indictment were robbed. There was no actual theft of any money from these banks." (A. 71).

Appellant then went on to unequivocally admit his participation in the conspiracy, clearly showing that he understood the nature of the crime to which he was pleading.

> "The Court: Do you understand that a conspiracy involves two or more people; do you understand that?"
>
> "Defendant Gerardi: Yes, I understand that."
>
> "The Court: And do you understand that there must be an agreement between these people? Do you understand that?"

"Defendant Gerardi: Agreement how, sir?"

"The Court: There must be an arrangement, an understanding, that's the basis of the agreement, an arrangement and understanding."

"Defendant Gerardi It doesn't have to be verbal, just an understanding."

"The Court: You could act in such a way that this is an understanding of what you are doing."

"Defendant Gerardi: Yes, sir."

* * * * *

"The Court: Do you understand that going to these banks with yourself and Schreter was part of your conspiracy; did you understand that?"

"Defendant Gerardi: Now, I understand it's part of my conspiracy; yes."

"The Court: Did you understand it then!"

"Defendant Gerardi: At that time I never thought anything like this would. Now I know that was part of a conspiracy." (A. 73-75).[10]

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[10] We deem it appropriate to note at this point that it is permissible for the trial court to accept a guilty plea even when a defendant refuses to admit his guilt or asserts his innocence so long as it is supported by a strong factual basis on the record. *North Carolina* v. *Alford*, 400 U.S. 25 (1970) Appellant's response certainly cannot be categorized as a refusal to admit guilt or an assertion of innocence. Nor can much credence be given to appellant's claim that he was under the impression he would take a "Serrano" or "Alfred" type plea considering Mr. Jone's and Mr. Dawson's statements to the contrary. (A. 97-98). However, even if appellant had pleaded guilty under such circumstances, i.e. without acknowledging his guilt, under the *Alford* standard his plea could not be considered involuntary.

In addition, even assuming that the responses of Gerardi to the Rule 11 were inadequate, we contend that nevertheless, the record is adequate to provide a sufficient basis for acceptance of his plea of guilty. It is our contention that the district court's complete reading of the charge, to which Gerardi acknowledged his guilt, together with his other responses to the court's questions, set forth the factual elements of the crime. *Seiller* v. *United States*, Docket No. 75-2002, (2d Cir., Slip op. 6509, decided December 1, 1975); *Rizzo* v. *United States*, 516 F.2d 789, 794 (2d Cir. 1975); *Irizarry* v. *United States*, *supra*, at 968, f.n. 9. The indictment here was uncomplicated, and set out in a "straight forward" matter: *Seiller* v. *United States*, *supra* at p. 6529. (Slip op.). The overt acts specified could hardly have been misunderstood by Gerardi, and indeed, as the record shows, they were not; he admitted Over Acts Numbers Two and Five (A 69-70). Moreover, Gerardi when asked, "did you actually do what you were charged with in this indictment?" responded, "yes, sir." (A. 75). Contrary to Gerardi's claim, his answer was neither ambiguous nor hesitant nor exculpatory. In short, there was a factual basis for the guilty plea in: (1) Gerardi's unequivocal admission that he had committed the crime charged in the indictment, which indictment had been read to him, on the record; (2) Gerardi's admission that the purpose for casing the banks was "for a later date to be robbed" (A. 73); (3) his admission that he had committed Overt Acts Numbers Two and Five; and (4) Gerardi's full knowledge and understanding of the nature of the charge, i.e., conspiracy to which he was pleading guilty.

Finally, appellant contends that his guilty plea was involuntary because it was influenced by his *recent* federal conviction in Boston.[11] We submit that fear of conviction does not render a guilty plea involuntary.

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[11] Appellant had been convicted in the District of Massachusetts on January 26, 1976, approximately two months before his April 6, 1976 plea of guilty here.

Clearly, appellant had the choice of persisting in his not guilty plea and putting the Government to its proof or pleading guilty. A plea that represents a voluntary and intelligent choice among the alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment. *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970). Appellant cannot now be heard to say that his plea was involuntary simply because he chose to adopt the better of what to him were certainly two unpalatable alternatives. *United States ex rel Delman* v. *Butler*, 390 F. Supp. 606 (E.D.N.Y. 1975).

In the final analysis, the voluntariness of appellant's guilty plea certainly meets the standards set forth by the Supreme Court in *Brady* v. *United States*, 397 U.S. 742 (1970):

> A plea of guiity entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel, must stand unless induced by therats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). (*Id.* at p. 742; quoting *Shelton* v. *United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *reversed on other grounds*, 356 U.S. 26 (1958)).

(4) Alleged Lack of Prejudice to the Government

Next appellant contends that he should be permitted to withdraw his plea alleging that the Government would not suffer any prejudice. We contend that the Govern-

ment would have indeed been prejudiced had the plea been permitted to be withdrawn and that such prejudice was demonstrated to the trial court. Therefore, we submit that the motion was properly denied. See *United States* v. *Baker*, *supra*, 514 F.2d 208; *United States* v. *Truglio*, 493 F.2d 574 (4th Cir. 1974); *United States* v. *Jerry*, 487 F.2d 600 (3d Cir. 1973); *United States* v. *Lombardozzi*, *supra*, 436 F.2d 878; *United States* v. *Vasquez-Velasco*, 471 F.2d 294 (9th Cir. 1973), *cert. denied*, 411 U.S. 970.

During the October 15, 1976 hearing, Assistant U.S. Attorney Samuel Dawson informed the court that the co-defendant, Schreter had implicated Gerardi (A. 117). Although, the indictment against the appellant had been obtained without Schreter's testimony, Schreter's statement to the F.B.I. implicating Gerardi gave the Government evidence of great value concerning the nature and operation of the conspiracy and concerning appellant's participation. Had the Government been aware that Gerardi intended to proceed to trial rather than plead guilty, we would have taken the routine precaution of securing Schreter's cooperation and agreement to testify against Gerardi, if necessary, as a condition to our plea agreement with co-defendant Schreter. This procedure was unnecessary in view of the fact that all three defendants agreed, at the same time, to plead guilty. Consequently, Gerardi's contemporaneous guilty plea obviated the necessity of securing such cooperation and, of course, a sworn statement of Schreter. If such a statement had been taken, it is unlikely that there would now be an assertion from appellant that Schreter is prepared to exonerate him. In this regard, it is noteworthy that, to date, Gerardi has not come forth with an affidavit of either co-defendant to exculpate him. Absent this evidence, the entire assertion becomes, we submit, highly conjectural and speculative. Moreover, if appellant is

correct that Schreter is now prepared to exculpate him, contrary to his post-arrest admissions, we fail to understand the absence of such an important affidavit.

But even if the district court had concluded that the Government would not have been prejudiced by appellant's withdrawal of his guilty plea, the court still acted within its discretion in denying his motion. A lack of prejudice to the Government does not necessarily entitle a defendant to withdraw his plea. *United States* v. *Webster, supra,* 468 F.2d at 771.

(5) The Alleged Timeliness of the Withdrawal Motion

Appellant places great emphasis on the fact that his motion to withdraw his guilty plea was made before the imposition of his sentence. The significance of this, we contend, is simply that the test to be applied is not one of "manifest injustice" but rather the test is, is it "fair and just" to grant the motion to withdraw the plea, e.g., *United States* v. *Giuliano, supra,* 348 F.2d 217. We contend, as discussed, that application of this "fair and just" test does not warrant reversal of the judgment of conviction. Turning to the chronology, however, the time sequence is of interest and belies a speedy effort to withdraw the plea of guilty. As noted, appellant's sentencing date was originally scheduled for June 11, 1976, some two months after entry of the plea. At that time, appellant, through his counsel, requested an adjournment of the proceeding until July 2, 1976 in order to permit him to dispose of an outstanding Massachusetts state charge (A. 82). Again, on July 2, 1976 and July 23, 1976, appellant's sentence was adjourned at his request, and it was not until September 15, 1976, some five months after his plea of guilty, that appellant belatedly petitioned the court for the withdrawal of his guilty plea. Throughout

the entire five month period, despite the several appearances by either appellant or his counsel, appellant at no time communicated to the court a desire to withdraw his plea.[12]

Certainly, there is no time limit within which a motion to withdraw a guilty plea must be made, but, the dispatch with which a motion is made is one of the factors the court may consider in determining whether the motion should be granted. *Kadwell* v. *United States*, 315 F.2d 66 (9th Cir. 1963). Indeed, when a defendant has waited a lengthy period of time before moving for withdrawal of his plea and he has had the full benefit of competent counsel throughout, the reasons advanced in support of the motion must be viewed with great care, or to put it another way, the reasons must be of greater force *United States* v. *Barker*, *supra*, 514 F.2d at 222.

We contend that there is simply no merit to the claim that the decision to withdraw the plea was speedily made by Gerardi. Indeed, as seen, the chronology of events undercuts any such contention. It appears that this bootstrap argument is merely an attempt to avoid the implications and consequences of what was, in actuality, a tardy motion for withdrawal. Accordingly, the court did not abuse its discretion in not granting the motion for withdrawal of the guilty plea.

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[12] Although it appears that appellant had some earlier communication with his counsel about withdrawing his plea, this communication did not take place before June 11, 1976, appellant's original sentencing date (Appellant's App., A. 34).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
January 31, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

Joanne Bracco, being duly sworn, says that on the 3rd day of February, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Frank A. Lopez

31 Smith Street

Brooklyn, N.Y.

Joanne Bracco

Sworn to before me this
3rd day of February 1977

Carolyn N. Johnson

NOTARY PUBLIC
No. 41-[illegible]
Qualified in [illegible]
Term Expires March 30, 1977